

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GREATER CINCINNATI CARDIO-
VASCULAR CONSULTANTS, INC.

and

Case 9-CA-39928

ARLENE G. FALCK, AN INDIVIDUAL

Mark G. Mehas, Esq., for the General Counsel.
J. Alan Lips, Esq. and Stephanie S. Bisselberg, Esq.
(*Little, Stettinius & Hollister*), of Cincinnati, Ohio,
for the Respondent.

DECISION

Statement of the Case

Joseph Gontram, Administrative Law Judge. This case was tried in Cincinnati, Ohio on June 19 and 20, 2003. The charge was filed on January 21, 2003 and the complaint was issued on April 25, 2003. The issues are whether Greater Cincinnati Cardiovascular Consultants, Inc. (GCCC or the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (1) issuing a written warning to its employee, Arlene Falck, on September 18, 2002,¹ (2) instructing Falck, on November 7 and 8, against contacting coworkers, and (3) discharging Falck on November 13.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, provides cardiologic medical services to patients at its offices in the Greater Cincinnati, Ohio area. During the past year, a representative period, the Respondent derived gross revenues in excess of \$250,000 and received goods and services in excess of \$50,000 directly from points outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

¹ All dates are in 2002 unless otherwise indicated.

Robyn Lee is a consultant and is the Respondent's interim chief operating officer. Jennifer Selm is the Respondent's practice administrator, the highest management position below Robyn Lee. Robbie Howard is the manager of the Respondent's Clifton, Ohio office. Connie Arthur is the administrative assistant in the Respondent's Clifton office. Arlene Falck was a medical records clerk at the Respondent's Clifton office until November 13, 2002, when Howard terminated her employment. Joy Frierson is a medical records clerk at the Respondent's Clifton office.

a. The spill-proof cup dispute.

On August 26, the Respondent instituted a series of new work rules, including a rule that required any drinks at employees' desks to be in spill-proof cups.² Falck discussed the new rule with other employees. Neither Falck nor Frierson was pleased with this spill-proof cup rule. They felt that management was treating the employees childishly. Falck decided to express her displeasure by using a baby's sippy cup at her desk.³ Before she left to purchase a sippy cup, she asked Frierson if she should purchase a cup for Frierson. Frierson does not drive so she agreed that Falck should also purchase a cup for her. However, Frierson understood only that Falck would purchase cups to comply with the new policy. She did not know that Falck intended to purchase baby's sippy cups.⁴

Falck testified that she told Frierson that she was going to get a sippy cup, and that Frierson replied, "get me one too." (Tr. 50.)⁵ Frierson testified she did not know that Falck intended to buy sippy cups. I can and do accept the truthfulness of both statements, and conclude that Frierson did not hear Falck say what type of cup she was going to buy.

Falck purchased sippy cups, and included with the purchases were baby pacifiers. Falck and Frierson used the sippy cups at their desks and placed the pacifiers on top of their computers. Their desks were visible only to coworkers, not to the patients. Although Frierson was originally unaware that Falck would purchase baby's sippy cups, Frierson did display her cup and pacifier as part of her and Falck's protest against the spill-proof cup rule. Some employees told Falck that they liked her display of the sippy cups and pacifier, and other employees complained to management about the display.

After Falck and Frierson began using and displaying the sippy cups and pacifiers, Connie Arthur told Falck to get rid of the pacifier. Later that day, Lee met with Falck and Frierson and told them to get rid of the cups and the pacifiers. On September 4, Arthur and Lee

² The propriety of this rule is not before me. In any event, Lee credibly explained that the rule was meant to maintain the professionalism of the office and to comply with the Respondent's understanding of certain OSHA standards for medical offices.

³ "Sippy cup" and "slurpy cup" were the terms used by the parties throughout the hearing. The term "sippy cup" will be used herein to avoid the possible brand name confusion with the latter term and to utilize the baby connotation of the former term.

⁴ All facts found here are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been made from a review of the entire testimonial record and exhibits with due regard for logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to any witness testifying in contradiction of the findings, such testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was incredible and unworthy of belief or as more fully explained in the text.

⁵ References to the transcript of the hearing are designated "Tr."

held a disciplinary meeting with Falck and Frierson concerning their display of the sippy cups and pacifiers. Lee felt that Falck and Frierson were behaving insolently in displaying the baby items on their desks. On the other hand, Falck felt that their behavior was not inappropriate, and that they were simply complying with the new work rule of having spill-proof cups. Nevertheless, on September 4, Lee issued written warnings to Falck and Frierson, and advised them that their behavior was not appropriate and would not be tolerated. The September 4 written warnings only dealt with Falck's and Frierson's actions in displaying the sippy cups and pacifiers.

In late August-early September, Respondent learned that Falck had been making offensive and threatening statements to coworkers. Falck had criticized two coworkers' religious beliefs and had made comments about coworkers being fat. Falck had also made an implied threat to blow-up the car driven by a coworker.⁶ These threats and inappropriate comments were made at work. Accordingly, on September 18, 2002, Lee, Selm, Arthur and Howard held a meeting with Falck, and Lee issued her another written warning. This written warning cited Falck's improper comments to and about coworkers, as well as her actions regarding the sippy cup and her actions and inappropriate comments in telephone calls to her coworkers and managers. The warning included the following:

Administration feels that the two incidents is inappropriate behavior and is not consistent with GCCC Code of Conduct. Administration also indicated that the appropriate way to manage anger over any issue that was not agreeable or understandable to the employee is to present the issue privately to his/her supervisor or to the Human Resource Director.

The General Counsel contends that the cited language was an attempt by the Respondent to prohibit or discourage protected, concerted activity because the September 18 warning specifically dealt with Falck's alleged concerted activity involving the sippy cups. However, the warning also dealt with Falck's improper comments to her coworkers, as well as telephone calls made by Falck to managers and coworkers, and there is no contention that these comments or telephone calls involved protected activity. There is nothing in the written warning itself nor in the statements made by the managers in the meeting with Falck to support the conclusion that the cited language in the warning referred to protected, concerted activity, as opposed to Falck's improper comments and telephone calls.

Since approximately March 2002, Falck had been calling coworkers and managers at home concerning issues at work. These calls were occasionally made at inappropriate hours—one call was made at about 11 p.m. and another call was made after midnight. Falck telephoned Howard in July while Howard was on vacation. Falck also made entirely improper comments in several of these telephone calls. In the July telephone call, Falck called Howard a racist. In another telephone call, Falck called Selm a bitch. And in a telephone call to Selm, Falck called another supervisor a black bigot. Coworkers complained to Howard and Lee about Falck telephoning them at home. Howard instructed Falck not to make such telephone calls.

In considering these circumstances, including the inappropriate comments made by Falck at work to coworkers, the evidence does not permit a determination that the September 18 written warning was an attempt by the Respondent to prohibit or discourage protected, concerted activity. Even though Falck did call some coworkers after work hours to discuss the policy on spill-proof drinking cups, it is unlikely that the proscriptive language in the September

⁶ Falck admitted making this threat, as well as making other inappropriate comments. Tr. 291, 429-430.

18 warning refers to protected, concerted activity, especially in view of the egregious nature of Falck's calls and comments to coworkers and management. Considering the testimony of Howard and Selm regarding their discussion with Falck in the September 18 meeting, the ambiguity of the language in the warning, and the other facts set forth above, it is as likely, if not more likely, that the quoted language in the written warning refers to Falck's improper comments and telephone calls as to her alleged concerted activity involving the Respondent's policy on spill-proof drinking cups.

Without regard to the intended or likely effect of the September 18 written warning, I must still address why it was issued. Specifically, I must address the General Counsel's contention that the September 18 written warning was issued to Falck because she engaged in concerted activity to protest the Respondent's policy regarding spill-proof cups.

The Respondent had already issued a warning to Falck on September 4 regarding her and Frierson's protest of the policy on spill-proof cups. Thus, there was no apparent need to issue another written warning to address the same matter, especially one that had no greater disciplinary effect than the written warning already issued. Moreover, the additional matters addressed in the September 18 warning—inappropriate and threatening statements to coworkers—were legitimate areas of management concern. Nevertheless, the written warning specifically refers to Falck's "concerted"⁷ conduct in displaying the baby spill-proof cups, calls this conduct inappropriate, and links this conduct to the written warning. Accordingly, I find that the September 18 warning was issued to Falck in response to and in order to address, in part, Falck's actions in displaying the baby spill-proof cup and pacifier.

The September 18 written warning also notified Falck that another work-related incident could result in her employment being terminated. It is significant that this notification was in the September 18 written warning because that warning was issued to address Falck's improper comments to staff and managers as well as her display of the sippy cup and pacifier. Falck's improper comments included the making of terrorist threats, sarcastic remarks concerning coworkers' religious beliefs and supposed weight problems, and calling one supervisor a racist, another a bitch, and another a black bigot. On the other hand, the September 4 warning, which did not contain a warning of possible termination, was issued to address Falck's display of the baby items alone.

b. Change in work hours.

Before November, Falck and Frierson worked 35-hour weeks. In the late autumn, Howard made an efficiency study of the employees in the Clifton office and determined that the medical records clerks should work full 40-hour weeks to ensure their availability during the physicians' office hours. Howard established two shifts, one for each clerk, of 8-4:30 p.m. and 9-5:30 p.m. Howard and Lee met with Falck on November 7 and explained to her the new shifts. Howard offered Falck the first choice of shifts, because of her seniority as an employee, and explained that the new hours would take effect in 2 weeks in order to allow Falck to make personal adjustments. Howard advised Falck that she had to accept one of the new shifts and that failure to do so would constitute a resignation.

Howard conceded that Falck would be discharged if she refused to accept the hours of

⁷ Although the following fact is far from conclusive, the written warning describes Falck's action as "using baby spill proof cups and displaying baby pacifiers at **their** desk." (Emphasis added.)

the position. Whether it is called a resignation or a termination, while perhaps relevant for some other purpose such as eligibility for unemployment compensation, is irrelevant for purposes of this proceeding. The bottom line is the same—Falck could not continue working for the Respondent unless she accepted the new hours.

Falck refused to accept the new schedule. She said that she had personal matters, including taking care of her father and going to therapy, that prevented her from being able to work after 2 o'clock in the afternoon. Falck was very upset during the November 7 meeting and refused, throughout the meeting, to accept the new work hours. Falck asked Lee to reconsider the new work schedule, and Lee agreed to discuss the change with management the next day. In spite of Falck's refusal to accept the new work schedule, Howard and Lee encouraged her to carefully consider her decision and to withhold her final decision for 24 hours until she had a chance to discuss the matter with her family.

That evening, at approximately 5:30 p.m., Falck telephoned Lee who was still at work. Falck was crying. She called the new work schedule a personal attack on her. (Falck had previously telephoned Howard and left a message on Howard's voice mail saying that she believed the new work schedule was racially motivated.) Falck criticized Lee's status as a consultant. The conversation was unsettling to Lee, and at the end of the conversation Lee asked Falck not to call anybody at home regarding the matter.

The next day, November 8, Lee met with the Respondent's management team who decided that the changes were necessary for the operation of the office. Lee then met with Falck and advised her of management's decision. After some discussion, Falck agreed to work under the new hours and accepted the 8-4:30 p.m. shift. Nevertheless, as Falck admitted, she was still "very, very upset." (Tr. 74.) It is unclear whether Lee again told Falck not to call other employees at home or not to call a particular employee at home. Lee does not remember whether she gave this direction to Falck after the second meeting. Falck first stated that Lee gave her this direction after the second meeting on November 8, but not after the first meeting on November 7. She later said that Lee had given her instructions in both meetings, although in the second meeting Lee's instruction was simply to not call "you know who." (Tr. 113.) Whether Lee told Falck once or twice to not call employees at home concerning their conversations has no affect on my resolution of this matter. The question is, did Lee prohibit Falck from discussing the changes in working hours with other employees.

In considering the history and nature of Falck's telephone calls to coworkers and managers, her reluctant, if not embittered, acceptance of the new work hours, and the emotional toll on Falck of the new hours, I conclude that Lee's instructions were not meant by Lee nor reasonably understood by Falck to constitute a prohibition against discussing changes in working hours with other employees. Moreover, the words used by Lee would not reasonably be understood by Falck to prohibit all discussions on the topic of Falck's and Lee's conversation. Lee specifically told Falck not to call other employees concerning their conversation, and given the history, such a direction could and would be reasonably seen as an attempt to forestall the type of improper telephone calls such as had occurred in the past. Lee did not specifically prohibit Falck from discussing changes in work conditions with other employees, and in light of the context of the statement and the background of other telephone calls and Falck's emotional state, Falck would not reasonably have understood Lee's statement as prohibiting the discussion of such changes.

This conclusion is supported by a memorandum in Falck's personnel file.⁸ Although the General Counsel argues that the language in the memorandum shows that Falck was being denied permission to talk to other employees about changes in work conditions, I disagree with this contention. The memorandum, allegedly describing the events of November 8, states, "Due to the history of insubordination, Arlene was told that if she called anyone from the practice at home or caused any havoc at work she would be terminated." Again, the memorandum, like Lee's statements, only refers to telephone calls from Falck, a practice she had previously abused. The memorandum does not contain any direction to Falck against discussing work issues with other employees.

In making this determination, I am aware that the September 18 written warning to Falck advocated that she should discuss privately with her supervisor employment issues that she did not agree with or understand. If the September 18 memorandum could be read to modify or explain Lee's instructions to Falck on November 7-8, those instructions might be seen in a different light. However, the September memorandum and the November instructions were issued for different reasons and causes. In September, management was dealing with its own resentment at Falck's open criticism of its no-spill cup rule. In November, management was dealing with Falck's resentment at the change in work hours. Management's instruction in September that Falck address employment issues (viz., criticism) privately with a supervisor emanates from and is motivated by different reasons, and therefore is inapplicable to, management's direction in November that Falck not call coworkers at home.

The General Counsel claims that the prohibition in the memorandum against causing havoc refers to Falck's action in August when she displayed a sippy cup. Although this claim is not groundless, the evidence does not support it. First, the incident with the sippy cup had occurred more than 2 months previously. Second, there is no evidence that the incident lingered in the minds of any managers. Third, to describe the sippy cup incident as causing havoc would clearly exaggerate the incident both in its effect and how the employees and management treated it. Havoc would just as likely refer to Falck's calling one manager a racist, another a bitch, and another a black bigot, or criticizing a coworker's religion or making terrorist threats against another coworker. Accordingly, I find that the prohibition in the memorandum against causing havoc simply means what it says, and is not a subterfuge for prohibiting protected, concerted activity.

For all of these reasons, I conclude that Lee's direction to Falck against calling persons at home referred to, and was reasonably understood by Falck to refer to, her previous practice of making improper telephone calls to employees at home.

c. Termination from employment

On the morning of November 13, Eleanor Walker, the receptionist at the Clifton office, went to Howard and reported that Falck had been walking through the receptionist area in the office, where patients are present, talking about how she "hates this place, this place sucks, and just making all these comments." (Tr. 313.) Walker asked Howard if she could make Falck stop. Howard went to the medical records area where she observed Falck saying to Selma, closely and loudly, "All the things I've done for you. All the lies I've told for you. You stabbed me in the back." (Tr. 315.) Selma was upset by this aggressive display and, without responding to Falck, turned and went to her office.

⁸ GC Exh. 15.

Howard asked Falck what she was doing, and Falck said, "I'm telling her how I felt." (Tr. 316.) Howard replied that this behavior was not acceptable. Howard then went to find Selm to see if she was all right and to advise Selm that she had decided to discharge Falck for this behavior. As Howard explained, the behavior was particularly reprehensible because of its loudness, its rudeness, and because it occurred in an open area, able to be observed by coworkers and, possibly, heard by patients.

Falck denied that Howard was present during the time that she was confronting and berating Selm. I do not accept the accuracy of this statement. Howard acknowledges that she did not witness the entire confrontation, and it is possible that Falck did not see her during the confrontation. Moreover, I credit Howard's testimony that she witnessed Falck's aggressive and rude manner and statements to Selm as noted above. I further credit Howard's testimony, and reject Falck's denial, that Howard told Falck that this behavior was not acceptable before she went to assist Selm.

Falck explained that she had confronted Selm because of the hostile treatment that Falck felt she was receiving from management, particularly being told that she could not talk to anyone about her sippy cup. Although the credibility of this testimony is not necessary to resolve the lawfulness of Howard's decision to discharge Falck because of the outburst, I find that this explanation, this attempt to clothe her outburst in the Act's Section 7 rights, is incredible. Indeed, Falck described no occasion when she felt constrained by the alleged direction against discussing her sippy cup. The reason Falck confronted and rebuked Selm was because Falck was still peeved at being forced to work a full 40-hour week. The Respondent's management had been particularly solicitous, perhaps overly solicitous, of Falck's dissatisfaction with the new schedule. Falck eventually accepted the new schedule, but she was still very upset. This distress was the reason for Falck's outburst to Selm.

Although Howard made the decision to terminate Falck, she telephoned Lee to come to the office to effectuate the termination. Lee arrived at the Clifton office at approximately 1 p.m. She typed a termination letter to give Falck, and asked Falck to come into a private office. Falck demanded a witness from the staff. Lee told her that it would not be fair to put an employee in that position, but she could have any other supervisor as a witness. Falck refused and she turned and walked away. Lee followed her and pleaded with her to come into a private office. Lee even suggested that she could call her attorney, but Falck declined. Falck reached her desk area where an outside telephone repairman was doing some work. Lee, once more seeking to avoid handling the matter in public, again asked Falck to come into a private office, but Falck refused. Accordingly, Lee advised Falck that her employment was terminated. Falck smiled, gathered a few personal things, and left.

Falck testified that Lee had screamed at her and was hostile. However, the telephone repairman described Lee as calm and professional, and testified that she did not raise her voice. I credit the testimony of the repairman, a reluctant but disinterested witness to some of these events, and I again find Falck's contrary testimony to be incredible.

Falck had removed most of her personal things from her work area the week before she was terminated. She attributed this to her expectation that she would be terminated. However, she offered no justifiable or specific reason for such an expectation, only saying that "for two or three times Robyn Lee had me so upset that I was embarrassed in front of my peers at my age, crying like a sibling [sic] because this woman totally attacked me." (Tr. 148.) Even if this statement were true, there is no evidence of what Lee had done to embarrass Falck in public. Moreover, the credibility of Falck's testimony is undercut by Falck's actions on the day she was terminated when it was she who caused Lee embarrassment by forcing Lee to discharge her in

front of coworkers and an outside repairman.

The inference from Falck's claim that she expected to be discharged before early November is that the firing was based on Falck's alleged protected, concerted activity at the end of August. The evidence does not warrant such an inference. Rather, the evidence shows that Falck remained very upset at the change in her work hours, with the inference that she no longer wished to continue working for the Respondent under the new work hours. Accordingly, she began removing her personal things from her office. She even had asked a doctor in the office for a job recommendation. Seen in this light, Falck's actions on November 13 are more explicable as an effort to get discharged from a job that she no longer desired, especially her immediate reaction of smiling after being told that she was terminated.

Moreover, an inference that the Respondent intended to discharge Falck before November 13 is convincingly refuted by the Respondent's actions the week before Falck was discharged. On November 7 and 8, Lee and Howard implored Falck to reconsider her refusal to accept the new schedule and to remain working for the Respondent. If Lee and Howard had wanted to terminate or get rid of Falck on November 7, they could have and would have accepted her refusal to work the new hours. Indeed, they could easily have done so and would have had a valid reason for doing so. Instead, they both asked Falck to reconsider and to take a day and talk to her family. Falck remembers that Howard was "very excited. . . [s]he didn't want to lose me" after Falck reconsidered her decision and decided to accept the new hours. (Tr. 438.) These are clearly not the actions of persons who had the intent, at that time, to terminate Falck. Accordingly, the evidence supports the inference that the Respondent, through Howard, formed the intent to discharge Falck after November 8. Since the only evidence of misconduct or of conduct arguably warranting discharge occurred on November 13, the inescapable conclusion is that Falck's actions on November 13 were the reason for her discharge, and not any protected activity Falck may have undertaken in August.

III. Analysis

a. September 18 written warning to Falck

Falck received a written warning on September 18. The written warning dealt with two offenses, only one of which is pertinent to the present analysis, viz., her display of a sippy cup and a baby pacifier at her desk. The question presented is whether Falck's actions in displaying these items were part of or constituted concerted activity protected by Section 7 of the Act. If her actions are protected, the Respondent's discipline of her violates Section 8(a)(1) of the Act.

Section 7 of the Act protects employees who engage in concerted activities for mutual aid or protection. These two elements, concert and mutual aid, are separate, and each must be proven before a violation can be established. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

In order for an employee's activity to be concerted, it must be undertaken with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*). The definition of concerted activity encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action as well as individual employees bringing truly group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*). Once an activity is found to be concerted, a violation may be found if (1) the employer knew the activity was concerted, (2) the concerted activity was protected by the Act, and (3) the adverse employment action at issue was motivated by the employee's protected concerted activity.

Meyers I.

1. In concert

Falck displayed her sippy cup and baby pacifier in the same manner, time, and location as did her coworker, Frierson. Their working areas were within several feet of each other, and they both intended their display of the cups and pacifiers to be a protest against the Respondent's institution of the spill-proof cup rule. Whether Falck purchased the sippy cup and pacifier with Frierson's knowledge or authorization is irrelevant because once the materials were displayed, their action became concerted. See *Mike Yurosek & Son*, 306 NLRB 1037 (1992), enf'd. 53 F.3d 261 (9th Cir. 1995). Moreover, it was the display of the materials that was the subject and cause of the Respondent's discipline of Falck and Frierson, not the purchase of those items. The display of the cups and pacifiers by Falck and Frierson was a joint activity, both in manner and purpose. The activity was concerted within the meaning of Section 7.

Meyers I.

A portion of the Respondent's position statement, filed with the NLRB in Case 9-CA-39799, was admitted into evidence. During her testimony, Lee refused to admit that she had read the position statement when the Respondent's counsel sent it to her. Whatever this says about Lee's failure to perform her duties as the chief executive officer of the Respondent, it does not defeat the admissibility of the document. See *Hogan Masonry*, 314 NLRB 332, 333 fn. 1 (1994); *Massillon Community Hospital*, 282 NLRB 675 fn.5 (1987). Counsel for the Respondent stated in this position statement, "She [Arlene Falck] also convinced Ms. Frierson to join her in displaying toddler sippy cups and baby pacifiers in there work areas to make the point to management and other employees that they felt they were being treated like children." (GC Exh. 12.) This statement constitutes an admission by the Respondent that Falck was acting in concert with another employee when they displayed their sippy cups and pacifiers, and that the Respondent believed that these two employees were acting in concert. This admission constitutes independent support for the finding and conclusion that Falck's actions were concerted. *United States Service Industries*, 314 NLRB 30 (1994).

2. Employer's knowledge

The Respondent knew that Falck's activities were concerted because of the proximity of Falck's and Frierson's work areas and because the Respondent knew that the cup and pacifier display was directed against its newly issued spill-proof cup rule.⁹ Moreover, the Respondent issued virtually identical written warnings to Falck and Frierson concerning their display of these items.

3. Activity protected by the Act

In order to be an activity protected by the Act, it is not necessary that the action seek to improve only wages or hours. The mutual aid or protection clause of section 7 is broadly construed, and the reach of section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Nor is it necessary that all or any other employees agree with the protesting employee for the action to be protected. *NLRB v. Jasper Seating Co.*, 857 F.2d 419 (7th Cir. 1988), enf'g. 285 NLRB 550 (1987). In the present case, the Respondent's spill-proof

⁹ See GC Exh. 5 ("In response to the memo of August 26, Joy and Arlene started using baby spill proof cups and displaying baby pacifiers at their desk.")

cup rule was a matter of dispute within the Respondent's Clifton office. The rule affected the terms and conditions of employment for the employees in the Respondent's Clifton office because it restricted the manner in which employees would be able to drink beverages at their desks in the office. Falck, as well as Frierson, showed their dissatisfaction with the rule by displaying the baby items for which they were later disciplined. Accordingly, Falck's activity in displaying the sippy cup and pacifier at her desk was activity protected by Section 7 of the Act.

4. Motivation of the adverse employment action

Falck received a written warning on September 18. This disciplinary action was based, at least in part, on Falck's protected activity in displaying the sippy cup and pacifier. Indeed, this motivation is reflected in the written warning received by Falck,¹⁰ and the Respondent does not dispute that Falck (as well as Frierson) was disciplined for this activity.

Although Falck discussed the spill-proof cup rule with other employees during and after her concerted display of the sippy cup and pacifier, there is no evidence that the Respondent's September 18 written warning to her was in any way connected with such discussions. Indeed, there is no evidence that the Respondent was even aware of such discussions. The violation found here is based only on Falck's concerted action in displaying a sippy cup and pacifier, as alleged in paragraph 5(b) of the complaint, not on any discussions she had with other employees about the rule, as alleged in paragraph 5(a) of the complaint.

The Respondent contends, without citing any authority, that Falck's display of the baby items exceeded the protection of the Act because her conduct mocked and disparaged the Respondent's management decision. Although an employee's right to engage in concerted activity must permit some leeway for impulsive behavior, under certain circumstances concerted activity may lose the Act's protection. *American Steel Erectors, Inc.*, 339 NLRB No. 152 (2003). In such circumstances, it is necessary to balance the right of employees to engage in protected, concerted activities with the right of an employer to maintain order and control. *Sprint/United Mgmt. Co.*, 339 NLRB No. 127 (2003).

Conduct that loses the protection of the Act is described as egregious or malicious or opprobrious. *Id.* In making the determination whether conduct is so egregious as to take it outside the protection of the Act, the Board examines the following factors in cases involving a verbal outburst: (1) the place of the discussion or action; (2) the subject matter of the discussion or action; (3) the nature of the employee's action; and (4) whether the action was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). While these factors should not be inalterably applied outside the context of verbal outbursts, they do help to inform the matters that may be considered in the balancing process.

The first factor neither favors nor opposes a determination of egregiousness. The second factor favors protection, since Falck's action was itself protected, and the fourth factor detracts from protection because her action was not provoked by the Respondent's unfair labor practice. The balance must be struck in favor of protection because the nature of Falck's action was not of a type or degree that is usually associated with the term egregious. The display of the baby items was not directed against or about any person, but rather a newly instituted rule. The display was not visible to the public and it caused no disruption among the office's staff. Moreover, Falck removed the items from her desk after being told to do so by management. Under the circumstances, Falck's action was not egregious, much less so egregious as to take it

¹⁰ GC Exh. 6.

outside the protection of the Act. See *Farah Mfg Co.*, 202 NLRB 666 (1973) (refusal to lower voice during protected, concerted activity was protected and was not insubordinate). On balance, I find that, under all of these circumstances, Falck's right to engage in protected, concerted activities prevails over the Respondent's right to maintain order and control.

Accordingly, for all of the foregoing reasons, the Respondent's discipline of Falck on September 18 violated Section 8(a)(1) of the Act.

b. November 7-8 instructions prohibiting discussing changes in work hours.

An instruction prohibiting employees from discussing work conditions with other employees would contravene rights granted by Section 7 of the Act. *Automatic Screw Products Co.*, 306 NLRB 1072 (1992). To determine if such an instruction would violate Section 8(a)(1) of the Act, the effect of the instruction on employees' Section 7 rights must be balanced against the employer's legitimate interests in issuing the instruction. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 107-114 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795-799 (1945). Because I have found that Lee's instructions to Falck on November 7-8 were not meant by Lee nor reasonably understood by Falck to prohibit Falck from discussing work issues with other employees, it follows that the instructions given to Falck did not violate the Act.¹¹

However, even if the instructions given to Falck were deemed to encompass, and prohibit the discussion of, work conditions, I still conclude that such instructions did not violate Section 8(a)(1) of the Act. Falck was prohibited only from calling other employees at their homes. She was not specifically prohibited from discussing any work issue with other employees or from discussing any matters with employees in any other way. This limited prohibition is more than offset by the Respondent's legitimate concern over Falck's previous actions in telephone calls to staff where she called one manager a racist, another manager a bitch, and another manager a black bigot.

The Supreme Court has stated that "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.*, supra at 113. As noted, I have found that the Respondent did not place, and was not understood to have placed, any restriction on Falck's right to discuss work issues with employees. Nevertheless, since the broad language of the Respondent's instruction to Falck could be deemed to encompass employment matters, I also conclude, on balance, that the Respondent's legitimate concern and reason for giving the instruction to Falck more than offsets the possible, limited application of the instruction on Falck's Section 7 rights.

c. November 13, 2002 discharge of Falck.

The analytical test established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) applies to cases alleging violations of the Act under Section 8(a)(1) and 8(a)(3) that depend on employer motivation. First, the General Counsel must make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's action. The burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. If the employer's stated motive is found to be false, the circumstances may warrant an inference that the true motive is an unlawful one. *Shattuck Denn Mining Corp. v.*

¹¹ This conclusion is buttressed by Falck's telephone call to Lee at 5:30 p.m. on November 7 in order to discuss the new work schedule.

NLRB, 362 F.2d 466, 470 (9th Cir. 1966). Motive and union animus may be, and often are, proven through indirect evidence. *Sahara Las Vegas Corp.*, 284 NLRB 337 (1987).

In the present case, Falck engaged in protected, concerted activity, the Respondent knew of such activity, the Respondent exhibited animus toward the protected activity, and the Respondent imposed an adverse employment action on Falck by discharging her. Accordingly, I find that the General Counsel has satisfied its initial burden of proving that the Respondent violated Section 8(a)(1) of the Act in discharging Falck.

On the other hand, the adverse employment action occurred more than two months after the protected activity. Frierson, who was as involved in the protected activity as was Falck, remains employed by the Respondent. Also, the Respondent's managers who were responsible for the discharge, Lee and Howard, testified credibly that the only reasons for the discharge were Falck's actions on the day she was terminated, November 13. Only a week before she was discharged, Falck was so upset at the change in her work hours that she had intended to quit. She remained upset at the work hour change to and through the time she was discharged. Indeed, she smiled when Lee told her she was terminated, showing that she simply did not wish to work there any longer. And Falck's actions on the day she was terminated reflect this attitude. She confronted Selm, the Respondent's chief administrative manager, in the office, loudly questioned Selm's integrity, and claimed to have told lies in the past to protect Selm. There is no evidence of Selm having done anything to provoke this attack. Falck did not wish to continue working for the Respondent under her new work hours, and in confronting Selm, Falck either intentionally engaged in such misconduct or simply did not care about the consequences.

Moreover, as more fully set forth above, any inference that the Respondent intended to discharge Falck for reasons existing before November 13 is convincingly refuted by the Respondent's actions the week before Falck was discharged. On November 7 and 8, Lee and Howard pleaded with Falck to reconsider her decision to not accept the new work hours. Falck did reconsider and both Lee and Howard were pleased that she had decided to remain. If Lee and Howard harbored any intent to terminate Falck because of her protected activity in August, they would not have pleaded with Falck to reconsider her decision and to accept the new work hours. Thus, the motivation to discharge Falck arose after November 8 and, for that reason, was not based on Falck's protected activities in August.¹²

The Respondent has proven that it would have discharged Falck in November without regard to Falck's protected activity in August. Accordingly, the Respondent's discharge of Falck on November 13 did not violate Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹² In view of this disposition of the case, there is no need to address the Respondent's alternate contention that it would have discharged Falck based solely on her refusal, on November 13, to accompany Howard to a private office at which Howard intended to deliver a termination document to Falck. Falck refused because she was not allowed to have a coworker (as opposed to a manager) accompany her. In any event, the validity of this alternate contention is not free from doubt. See *Epilepsy Foundation*, 331 NLRB 676 (2000), *enfd.* in relevant part 268 F.3d 1095 (D.C. Cir 2001); *cf. Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

2. The Respondent violated Section 8(a)(1) of the Act by disciplining its employee on September 18, 2002 because that employee had engaged in protected, concerted activity in protesting a work rule of the Respondent.

5 Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

10 Having found that the Respondent unlawfully disciplined its employee, Arlene Falck, because she engaged in a protected, concerted activity, I shall order that the Respondent cease and desist from such conduct and shall post a notice of its violation and its compliance with the Act.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

20 ORDER

The Respondent, Greater Cincinnati Cardiovascular Consultants, Inc., Clifton, Ohio, its officers, agents, successors, and assigns, shall

25 1. Cease and desist from

(a) Unlawfully and in violation of the Act disciplining its employees because of their protected, concerted activities.

30 (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

35 (a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Arlene Falck, and within 3 days thereafter notify Arlene Falck in writing that this has been done and that the discipline will not be used against her in any way.

40 (b) Within 14 days after service by the Region, post at its facility in Clifton, Ohio copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

45 ¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

50 ¹⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 14, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. [Date]

Joseph Gontram
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discipline or in any way penalize employees because such employees engage in concerted activities dealing with the terms and conditions of their employment.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Arlene Falck, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discipline will not be used against her in any way.

Greater Cincinnati Cardiovascular Consultants, Inc.

(513) 684-3686, Hours: 8:30 a.m. to 5:00 p.m.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (513) 684-3750.